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**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON**

SURINDERJIT SINGH BRAR and BALVIR KAUR)
BRAR, husband and wife,)

Plaintiffs,)

v.)

THRIFTY PAYLESS, INC., a California corporation;)
and FIRST AMERICAN TITLE INSURANCE)
COMPANY, a California corporation,)

Defendant.)

Case No. C08-1777 RSM

ANSWER and COUNTERCLAIM

In Answer to the Complaint, defendant Thrifty Payless Inc., admits, denies and alleges as follows:

1. With regard to the allegations of paragraph 1, defendant Thrifty Payless does not have knowledge or information sufficient to form a belief as to the truth or falsity of the allegations and therefore denies the same.
2. The allegations of paragraph 2 are admitted.
3. The allegations of paragraph 3 are admitted.
4. The allegations of paragraph 4 are admitted.
5. The allegations of paragraph 5 are admitted.

1 6. The allegations of paragraph 6 are admitted.

2 7. The allegations of paragraph 7 are admitted.

3 8. The allegations of paragraph 8 are admitted.

4 9. The allegations of paragraph 9 are admitted.

5 10. With regard to the allegations of paragraph 10, defendant, Thrifty Payless alleges that the
6 requirements of the Agreement are as stated in the Agreement. Any other or different allegations
7 contained in said paragraph are denied.
8

9 11. With regard to the allegations of paragraph 11, defendant, Thrifty Payless alleges that the
10 conditions of the Agreement are as stated in the Agreement. Any other or different allegations of
11 said paragraph are denied.
12

13 12. The allegations of paragraph 12 are denied.

14 13. With regard to the allegations of paragraph 13, defendant Thrifty Payless admits that
15 plaintiffs failed to satisfy conditions precedent to closing. Any other or different allegations of
16 said paragraph are denied.
17

18 14. The allegations of paragraph 14 are denied.

19 15. The allegations of paragraph 15 are denied.

20 16. With regard to the allegations of paragraph 16, defendant Thrifty Payless admits that it
21 has not returned the nonrefundable earnest money deposit for good and sufficient reasons
22 specified in the Agreement. Any other or different allegations of said paragraph are denied.
23

24 17. With regard to the allegations of paragraph 17, defendant Thrifty Payless does not have
25 knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore

1 denies the same.

2 18. With regard to the allegations of paragraph 18, defendant Thrifty Payless does not have
3 knowledge or information sufficient to form a belief as to the truth or falsity of the allegations
4 and therefore denies the same.
5

6 19. The allegations of mis-numbered paragraph "14" [sic] are denied.

7 20. The allegations of mis-numbered paragraph "15" [sic] are denied.

8 21. With regard to the allegations of mis-numbered paragraph "16" [sic], defendant Thrifty
9 Payless admits only that Defendant First American may be holding \$300,985, but denies that
10 they are Plaintiffs' funds.]. Any other or different allegations of said paragraph are denied.
11

12 22. With regard to the allegations of mis-numbered paragraph "17" [sic], defendant Thrifty
13 Payless does not have knowledge sufficient to form a belief as to the truth or falsity of the
14 allegations and therefore denies the same.

15 23. Upon information and belief, the allegations of mis-numbered paragraph "18" [sic] are
16 denied.
17

18
19 Further answering the complaint and by way of affirmative defenses, as a counterclaim
20 defendant Thrifty Payless further alleges as follows:

21 24. Plaintiffs' complaint fails to state a claim upon which relief can be granted.

22 25. Plaintiffs' claims are barred by laches, waiver and estoppel.

23 26. As of November 30, 2007, defendant Thrifty Payless, Inc., as Seller, entered into and
24 Real Property Purchase and Sale Agreement ("the Agreement") with Amarjeet Singh, Jaswinder
25

1 Brar, and plaintiffs Surinderjit Singh Brar and Balvir Kaur Brar, husband and wife, as Buyers.

2 27. Plaintiffs' have failed to join indispensable parties to this action. Amarjeet Singh and
3 Jaswinder Brar have not been joined as parties to this action but are necessary parties as co-
4 Buyers under the Agreement.
5

6 28. The Agreement called for the sale of certain land and a commercial building located in
7 Kent, King County, Washington for a cash price of \$3,200,000.00 to be paid in full at Closing.

8 29. The Agreement called for a non-refundable deposit to be made by the Buyers in the
9 amount of \$100,000, which amounts to 3.125% of the purchase price.
10

11 30. Paragraph 3.C. of the Agreement provides, in pertinent part, as follows:

12 **C. REMEDIES, LIQUIDATED DAMAGES. IF THE CLOSING DOES NOT**
13 **OCCUR DUE TO THE BUYER'S DEFAULT UNDER THIS AGREEMENT, IT**
14 **WOULD BE IMPRACTICAL AND EXTREMELY DIFFICULT TO ESTIMATE**
15 **THE DAMAGES THAT SELLER MAY SUFFER. THEREFORE, THE PARTIES**
16 **HAVE AGREED THAT A REASONABLE ESTIMATE OF THE TOTAL NET**
17 **DETRIMENT THAT SELLER WOULD SUFFER IN SUCH EVENT IS AND**
18 **SHALL BE TITLE COMPANY'S DELIVERY OF THE DEPOSIT TO SELLER AS**
19 **LIQUIDATED DAMAGES, AS SELLER'S SOLE AND EXCLUSIVE REMEDY**
UNDER THIS AGREEMENT (SUBJECT TO THOSE PROVISIONS OF THIS
AGREEMENT, WHICH, BY THEIR EXPRESS TERMS SURVIVE THE
TERMINATION OF THIS AGREEMENT). SUCH LIQUIDATED DAMAGES
ARE NOT INTENDED AS A FORFEITURE OR PENALTY WITHIN THE
MEANING OF APPLICABLE LAW. . . .(Emphasis in original.)

20 31. The transaction contemplated in the Agreement was to close not later than January 15,
21 2008 (the "Original Closing Date").

22 32. Seller, Thrifty Payless, was ready, willing and able to close on the Original Closing Date.

23 33. Buyer was unable to close on the Original Closing Date due to the unavailability of
24 Buyers' financing.
25

1 34. As of January 23, 2008 Seller and Buyer entered into an Addendum to Real Property
2 Purchase Agreement (the "Addendum").
3

4 35. Buyer requested and Seller agreed to extend the Original Closing Date called for in the
5 Agreement on the terms and conditions set forth in the Addendum.

6 36. Paragraph 1 of the Addendum extended "the outside date for closing the transaction
7 contemplated by the Purchase Agreement . . .to Wednesday, April 30, 2008 (the "Extended
8 Closing Date") subject to Buyer's compliance with" the terms of the Addendum.
9

10 37. Paragraph 2 of the Addendum called for immediate release of the original \$100,000
11 deposit to Seller as follows:

12 "2. Release of Deposit. "Borrowers [sic] shall immediately cause the existing Deposit in
13 the amount of \$100,000 to be released to Seller. Such Deposit shall be non-refundable to
14 Buyer except in the event of Seller's default under the Purchase Agreement, but
applicable to the Purchase Price so long as closing occurs on or before the Extended
Closing Date.

15 38. Paragraph 3 of the Addendum required Buyer to make an additional \$300,000 deposit as
16 follows:
17

18 3. Additional Deposit. On or before 2:00 p.m. (Pacific Time) on January 29, 2008, Buyer
19 shall deposit with the Title Company an additional deposit in the amount of Three
20 Hundred Thousand Dollars (\$300,000)(the "Additional Deposit"). The Additional
21 Deposit shall be held by the Title Company in accordance with the terms of Paragraph 3
C of the Purchase Agreement. The Additional Deposit shall be non-refundable to Buyer
except in the event of Seller's default under the Purchase Agreement, but applicable to
the Purchase Price so long as closing occurs on or before the Extended Closing Date.

22 39. Prior to the Extended Closing Date, Buyers had direct negotiations with the existing
23 tenant of the subject property. Buyers were fully aware of the existing tenants use of the
24 property and sought to extend their lease and/or occupancy following the anticipated Closing.
25

1 40. Prior to the Extended Closing Date, Buyers entered into, stored materials in and made use
2 of the subject property.

3 41. Buyers did not object to the use being made of the premises by the existing tenant nor by
4 themselves at any time prior to the Extended Closing Date and waived and are estopped from
5 complaining about any such use or the condition of the premises resulting from such use.
6

7 42. Upon information and belief, a dispute arose between and among the Buyers with regard
8 to the payments required of Buyers collectively to close the purchase as called for in the
9 Purchase Agreement. Upon information and belief, certain of the Buyers were unable or
10 unwilling to come up with the money necessary to complete the purchase transaction. Others
11 sought to further extend or re-negotiate the terms of the purchase transaction.
12

13 43. As the Extended Closing Date approached in the spring of 2008, it became more difficult
14 to obtain financing than when the Agreement was entered into in late 2007.

15 44. Seller, Thrifty Payless, was ready willing and able to close on the Extended Closing Date.

16 45. Buyers, in breach of the Agreement, failed to deposit into escrow the Closing Payment
17 and the documents required to Close the transaction on or before the Extended Closing Date.
18

19 46. The transaction failed to Close due to the Buyers' inability or unwillingness to proceed
20 with the purchase as called for in the Agreement, and not due to any default by the Seller.

21 47. Any features of the building or its contents at the time of Closing were known to Buyers,
22 had been accepted by them and were not material to the failure of the transaction to Close.
23

24 48. Paragraph 11.E. of the Agreement provides for recovery of attorneys fees by the
25 prevailing party in any action to enforce the Agreement.

1 Wherefore, having fully answered the complaint, defendant Thrifty Payless prays for
2 relief as follows:

3 A. That the complaint be dismissed, with prejudice;

4 B. That the Court enter judgment declaring that defendant Thrifty Payless is entitled
5 to retain the \$100,000 non-refundable deposit previously received by it and to receive
6 the remaining \$300,000 non-refundable deposit held by defendant First American
7 Title Insurance Company;

8 C. That the Court adjudge and direct defendant First American Title Insurance
9 Company to disburse to defendant Thrifty Payless the remaining \$300,000 non-
10 refundable deposit held by it, plus pre-judgment interest;

11 D. That the Court award defendant Thrifty Payless its costs and reasonable attorneys
12 fees incurred herein, and such other and further relief, legal and equitable, as is just.

13
14
15 DATED this 22nd day of December, 2008.

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17 /s/ Delbert D. Miller
18 _____
19 Delbert D. Miller, WSBA # 1154
20 Attorneys for defendant Thrifty Payless, Inc.

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